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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/291,227	04/13/1999	MICHAEL G. HAYEK	IAM467PA	1823

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EXAMINER

WANG, SHENGJUN

ART UNIT	PAPER NUMBER
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1617

DATE MAILED: 08/18/2006

Please find below and/or attached an Office communication concerning this application or proceeding.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/291,227
Filing Date: April 13, 1999
Appellant(s): HAYEK, MICHAEL G.

Kelly L. McDow-Dunham
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed May 30, 2006 appealing from the Office action mailed March 11, 2005.

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(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

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The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

US Patent 5,937,790 Ito et al. August 17, 1999

Jyonouchi et al. "Immunomodulating actions of carotenoids: Enhancement of In vivo and In vitro antibody production to T-dependent antigens," Nutrition and Cancer, 1994, Vol. 21, No. 1, pages 47-58

Krinsky "Effects of carotenoids in cellular and animal systems", American Journal of clinical Nutrition, 1991, Vol. 53, supplemental pages 238s-246s.

Health 2000 (was cited as "Anon" in the final rejection), "Aliment specific dietary supplements," New Product News, 1997, Vol. 32, No. 12, page 40.

Derelanko et a. CRC Hand Book, 1991, page 11.

(9) Grounds of Rejection

Claim Rejections 35 U.S.C. § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1, 3-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ito et al. (US Patent 5,937,790, of record).

3. Ito teaches a method of reducing stress in animals, including cats and dogs, by administering to the animals a feeding composition comprising antioxidant selected from

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carotene and lutein etc. the antioxidant is in the concentration of about 0.02%. See, particularly, column 5, lines 16-20, 40-45, table 1 in column 8, and claims 15-16. Note, it is well known in the art that stress reduces the immunity. (see column 1, lines 23-26). Ito noted that domestic animals such as dogs and cats are inevitable subject to stress, because of the restricted living space (preventing from running off). See, column 1, lines 33-40.

4. Ito et al. does not teach expressly to choose lutein as the active ingredients, or particularly employ the lutein containing feed for immune enhancing purpose.

However, it would have been prima facie obvious to a person of ordinary skill in the art, at the time the claimed the invention was made, to employ lutein as the antioxidants in Ito's method since Lutein is one of the eight disclosed species (column 5, line 17-20), and is one of the preferred species (table 1 in column 8). The employment of lutein is seen to be a selection from amongst equally suitable material and as such obvious. Ex parte Winters 11 USPQ 2nd 1387 (at 1388). Further the reduction of stress certainly enhance the immunity since stress is known to reduce the immunity. As to the amounts of lutein specified herein 1-50 mg/day, note a dog or cat feed 5 to 250 grams/day of the feed disclosed by Ito (contains 0.2% of antioxidants) would meet this limitation. Further feeding a animal with proper amount of protein, carbohydrate and fiber is within the skill of artisan.

5. Claims 1, 3-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ito et al. (US Patent 5,937,790) in view of Jyonouchi et al. (IDS, March 22, 2002), Anon (health 2000) (IDS, March 22, 2002), and Krinsky (IDS, March 22, 2002), and further in view of CRC Handbook of Toxicology (of record).

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6. Ito et al. teach a animal feed comprising antioxidant selected from carotene and lutein etc. the antioxidant is in the concentration of about 0.02%. Ito further teaches method for reducing stress in animal comprising feeding the animal (including dog and cat) with the antioxidant agent. See, particularly, column 5, lines 16-20, and claims 8-16. Ito also teaches that the usefulness of carotenoids as food additive is for a broad range of animals including mammals and fish. See, particularly, column 6, lines 8-11. It is also known in the art that stress inducing reduction of immunity. Ito noted that domestic animals such as dogs and cats are inevitable subject to stress, because of the restricted living space (preventing from running off). See, column 1, lines 33-40.

7. Ito et al. does not teach expressly to choose lutein as the active ingredients, or particularly employ the lutein containing feed for immune enhancing purpose.

8. However, Jyonouchi et al teaches that carotenoids in general, and lutein in particular, as antioxidants, are known to be useful in enhancing immune response animals. See the abstract, and the discussion. Anon (Health 2000) teaches an ailment specific dietary supplements comprising lutein, which may be useful for enhancing immune response. See, the whole article. Krinsky teaches that it is well known that carotenoids have effect of immune enhancement in animals. See the abstract, and the summary. The CRC Handbook of Toxicology, 1995, at page 11 describes the fact that experimental animal models are known to be useful in condition that mimic human disease.

Therefore, it would have been prima facie obvious to a person of ordinary skill in the art, at the time the claimed the invention was made, to employ Ito's feed with lutein as the antioxidant, to feed cat or dog for enhancing their immune systems.

A person of ordinary skill in the art would have been motivated to employ Ito's feed with lutein as the antioxidant, to feed cat or dog for enhancing their immune systems because lutein is known to be useful for enhancing the immune system of animals, and is known to be useful in dog or cat feed. As to the amounts of lutein specified herein 1-50 mg/day, note a dog or cat feed 5 to 250 grams/day of the feed disclosed by Ito (contains 0.2% of antioxidants) would meet this limitation. Further, feeding a animal with proper amount of protein, carbohydrate and fiber is within the skill of artisan.

(10) Response to Argument

9. In response to appellant's arguments that Ito does not teaches the usefulness of lutein as anti-stress agent or as therapeutical agents, it is noted the instant claims are directed to effecting a biochemical pathway with an old and well known compounds. The argument that such claims are not directed to the old and well known ultimate utility (food additive) for the compounds, e.g., lutein, are not probative. It is well settled patent law that mode of action elucidation does not impart patentable moment to otherwise old and obvious subject matter. Applicant's attention is directed to *In re Swinehart*, (169 USPQ 226 at 229) where the Court of Customs and Patent Appeals stated "is elementary that the mere recitation of a newly discovered function or property, inherently possessed by thing in the prior art, does not cause a claim drawn to those things to distinguish over the prior art." The ultimate utility for the claimed compounds, i.e., feeding a animal in stress, is old and well known rendering the claimed subject matter obvious to the skilled artisan. It would follow therefore that the instant claims are properly rejected under 35 USC 103. Note the claimed invention does not exclude vitamin C from the animal feed.

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10. As to the rejections over Ito in view of Jyonouchi et al. Anon, Krinsky and CRC Handbook of Toxicology, appellant contends that the examiner did not consider the as a whole, and ingored the “gist” or “thrust” of the invention, the examiner disagrees. The claimed invention read on feeding dog or cat with a composition comprising lutein, wherein lutein is in an amount of 1-50 mg/day. As discussed above, such method has been fairly suggested. The examiner respectfully submits that it is appellants who have not considered the cited references as a whole, but have focused on very specific examples in cited references. For example, Jyonouchi teaches that carotenoids in general, and lutein in particular, as antioxidants, are known to be useful in enhancing immune response of animals. Jyonouchi never teach or suggest the usefulness of enhancing immune response is limited only to intraperitoneal injection to mice. As it is obvious that researcher would have no interest in improving the immune response in mice unless mice is a suitable animal model for other animals that is beneficial to human. Therefore, mice is an abvious suitable model for other mamals, including dog and cat. Taking the cited references as a whole, one of ordinary skill in the art would have been motivated to feed dogs or cats with a composition comprising lutein, particularly for enhancing immune response.

11. The 1.132 declaration by Hayek focus on Jyonouchi reference, asserting that based on Jyonouchi reference alone one of ordinary skill in the art could not be certain that lutein would be adsorbed at effective levels following oral administration. However, as shown in other references, lutein is a known nutritional ingredients and are known to be administerd orally. Taking the cited reference as a whole, one of ordinary skill in the art would have reasonably expectation that lutein, when taken as a food ingredient orally, would be effective in providing immune enhancements.

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(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

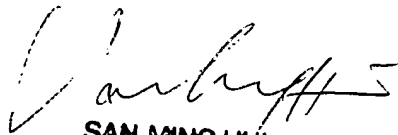
For the above reasons, it is believed that the rejections should be sustained.

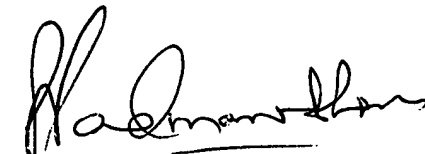
Respectfully submitted,

Shengjun Wang


SHENGJUN WANG
PRIMARY EXAMINER

Conferees: Sreeni Padmanabhan


SAN-MING HUI
PRIMARY EXAMINER


SREENI PADMANABHAN
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